



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 13-156

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail Eckstein, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Jennifer D. Frank, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School for the 2012-13 school year. The appeal must be sustained.

#### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student has received diagnoses including a reading disorder, a disorder of written expression, an attention deficit hyperactivity disorder, predominantly inattentive type (ADHD), and has moderate to severe delays in phonological awareness skills and auditory processing difficulties in tolerance-fading memory, decoding and organization of auditory stimuli (Dist. Exs. 10 at p. 14; 11 at pp. 1, 6-7; 13 at pp. 3-4; 14 at pp. 4-6).

The hearing record reflects that the student attended district schools from kindergarten through the middle of her second grade year (Dist. Ex. 10 at pp. 4-5). The parents withdrew the student from the district in March 2010 (during her second grade year) and enrolled her in a nonpublic school, where she remained through the end of the 2010-11 (third grade) school year (Dist. Exs. 7 at pp. 1-2; 10 at p. 5).<sup>1</sup> According to a social history evaluation conducted in December 2011, the student's father contacted the district requesting an evaluation of his daughter's eligibility for special education services during summer 2011 and, pending the initial evaluation of the student and determination of her eligibility for special education services by the CSE, he placed the student at the Aaron School for the 2011-12 (fourth grade) school year (Dist. Ex. 7 at pp. 1, 3).<sup>2</sup>

On January 30, 2012 the CSE convened for an initial determination of the student's eligibility for special education and related services (Dist. Exs. 3 at p. 13; 7 at p. 3).<sup>3</sup> The resultant IEP reflected that the CSE found the student to be eligible for special education programs and services as a student with a learning disability and recommended she be placed in a general education classroom with integrated co-teaching (ICT) services for all core subjects and special education teacher support services (SETSS) three times per week in English language arts (ELA) and twice per week in mathematics (Dist. Ex. 3 at pp. 1, 8-9).<sup>4</sup> The CSE also recommended the student receive related services of two 30-minute speech-language therapy sessions per week in a group of two (id. at p. 9). The projected date on which the January 30, 2012 IEP was to be implemented was February 13, 2012 (id. at p. 1).

The student's father completed and returned a "specific learning disability justification form" on January 31, 2012 upon which he noted that he agreed with the student's classification as a student with a learning disability, that he did not agree with the recommended program, and that he wished "to visit the recommended placement" (Dist. Ex. 15 at pp. 1-2).

On February 1, 2012 the parents signed an enrollment contract with the Aaron School for the 2012-13 school year and paid a nonrefundable \$8,000 deposit toward the cost of the student's tuition (Parent Exs. K; O at p. 1). The parents subsequently paid the balance of the student's tuition costs at the Aaron School for the 2012-13 school year (Parent Exs. L at p. 1; O at pp. 2-4).

---

<sup>1</sup> The hearing record reflects that while at the nonpublic school, the student "received no formal instruction in academic subjects in her school setting as the school's philosophical viewpoint [was] that learning should be child directed and [the student] ha[d] not chosen to participate in in academic instruction" (Dist. Ex. 11 at p. 3). Testimony by the student's father indicated that the student received some outside tutoring in reading and language during the time that she was in the nonpublic school (Tr. p. 180).

<sup>2</sup> The Aaron School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> The parents' impartial hearing request reflects that the January 30, 2012 CSE meeting was an "annual review IEP meeting," however, the social history, the IEP, and testimony by the student's father indicate that this was the student's initial IEP (Tr. p. 179; compare District Ex.7 at p. 3 with Dist. Ex. 3 at p. 2 and Parent Ex. A at p. 1).

<sup>4</sup> The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (Tr. pp. 13, 45; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

In a letter sent to the district by facsimile dated February 29, 2012, the student's mother informed the district that she had received notice of the public school site to which the student had been assigned for the remainder of the 2011-12 school year, but indicated that she did not want to interrupt the student in the middle of the school year and therefore would not consent to placement at that time (Parent Ex. H at p. 2).<sup>5</sup> The student's mother further indicated that she disagreed with the CSE's recommendation for placement in a general education classroom with ICT and SETSS services; however, she stated that she would visit the public school site recommended for the student for the 2012-13 school year once she received it to determine whether it was appropriate (id.).<sup>6</sup>

In a letter sent via facsimile dated June 21, 2012, the student's mother informed the district that although she was unsure whether the recommended public school site applied to the 2012-13 school year or only to the remainder of the 2011-12 school year, she had recently visited a fifth grade classroom providing ICT services (the ICT classroom) at the assigned school (Parent Ex. G). The letter reflected her concerns regarding the ICT classroom including, among other things, (1) "that an ICT class can have up to 32 students," despite that the student required a small student to teacher ratio and individualized attention; (2) the class was "too difficult" in that the other students were on or approaching fifth grade level in reading and math, whereas the student was reading on a mid-second grade level; (3) the student would be unable to handle the amount of homework assigned nightly; (4) some of the students in the class were classified as emotionally disturbed and exhibited behavioral issues which would cause the student to have difficulty concentrating; (5) the reading curriculum utilized in the ICT class was not the program which had been recommended in her speech-language evaluation; (6) the math program utilized in the class was one the student had struggled with in the past; and (7) the student's mother indicated that she was unclear as to how the recommendation for SETSS and ICT services would be implemented within the general education classroom for math and ELA (id. at pp. 1-2).

In a letter to the district dated August 19, 2012, the student's mother reiterated her uncertainty as to whether the notice of assignment she received in January 2012 also applied to the 2012-13 school year (Parent Ex. F). In the August 19, 2012 letter the student's mother also reiterated her concerns regarding the recommended program and the assigned public school site that she had visited and asking for confirmation that the school she visited was the student's recommended public school placement for the 2012-13 school year (id.).<sup>7</sup> The student's mother added that if so, she would visit again in September to determine if the school was appropriate and that, unless an appropriate program and placement were offered, the student would return to the Aaron School and she would seek tuition reimbursement (id. at p. 2).

By letter dated September 11, 2012, the district responded to the parents' indication that they had not received a specific public school site placement offer from the CSE for the 2012-13

---

<sup>5</sup> This notification of the assignment of the public school site does not appear in the hearing record.

<sup>6</sup> I note that the January 30, 2012 IEP spanned both the 2011-12 and the 2012-13 school years (see Dist. Ex. 3 at p. 1).

<sup>7</sup> The hearing record contains two final notices of recommendation (FNRs), one dated August 14 and the other August 17, 2012, indicating that the student was assigned to the same school for the 2012-13 school year as she had been for the second half of the 2011-12 school year (Dist. Exs. 1; 2; see Parent Exs. F, J).

school year, informed the parents that the district had previously sent an FNR on August 17, 2012, and enclosed a "courtesy copy" of the FNR (Parent Ex. I).

The student's mother revisited the assigned public school site in September 2012 and wrote the district on September 27, 2012, again rejecting the placement and stating that the student "require[d] a small class in [a] small school setting with full-time special education" (Parent Ex. J at pp. 2-3). In addition to reiterating her earlier concerns regarding the classroom she had observed, the student's mother indicated that during the second visit, the principal of the public school site refused to provide her with the reading levels and behavioral profile of the students in the class due to confidentiality concerns and that she could not determine if the class was appropriate without knowing the level at which the class was taught (*id.* at p. 2). She also stated in her letter that she did not receive a placement for the student for the 2012-13 school year prior to the start of the school year (*id.* at p. 3). She further indicated that based on the concerns outlined in her letter, she was rejecting the recommended program and placement, the student would remain at the Aaron School, and she would seek reimbursement for the program there (*id.*).

The hearing record reflects that the student ultimately attended the Aaron School for the 2012-13 school year (*see* Tr. pp. 125-26).

#### **A. Due Process Complaint Notice**

By amended due process complaint notice dated February 5, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year and requested reimbursement for the student's tuition costs at the Aaron School, transportation, and related services (Parent Ex. A).<sup>8</sup> Specifically, the parents asserted that they received an FNR in January 2012 but did not receive another FNR prior to the start of the 2012-13 school year (*id.* at pp. 1-2). The parents also alleged that the student's January 2012 IEP "expired on January 30, 2013" and that the district had not convened a CSE meeting to develop the student's IEP for the remainder of the 2012-13 school year (*id.* at p. 2). Regarding the conduct of the January 2012 CSE meeting and the content of the IEP developed at the meeting, the parents alleged that: (1) the CSE was improperly composed; (2) the CSE failed to consider the appropriateness of the evaluations before it; (3) the CSE failed to adequately consider reports indicating the student's need for a small class in a full time special education setting; (4) the IEP contained insufficient annual goals and objectives; (5) the IEP did not indicate how SETSS would be provided in a general education setting; and (6) an ICT class was too large a setting for the student to receive the individualized attention she required (*id.* at p. 1). The parents also alleged arguments concerning the appropriateness of the assigned school site, including that the curriculum in the ICT class would be too demanding for the student and the student's social/emotional needs could not be met in the general education environment (*id.* at pp. 1-2).

The district filed a response to the amended due process complaint notice on February 13, 2013 (Dist. Ex 16).

---

<sup>8</sup> The IHO's decision indicates that she "permitted [the parents] to file an amended due process complaint" (IHO Decision at p. 2). The initial due process complaint notice was not included in the hearing record.

## **B. Impartial Hearing Officer Decision**

An impartial hearing was convened in this matter on April 23, 2013 and concluded on June 10, 2013 after two hearing dates (Tr. pp. 1-249). By decision dated July 18, 2013, the IHO found, among other things, that the district failed to offer the student a FAPE for the 2012-13 school year, that the Aaron School was an appropriate placement for the student, and that equitable considerations favored the parents (IHO Decision at pp. 6-9).

The IHO found that the January 2012 IEP insufficiently reflected the student's attention deficits and that the management needs listed in the IEP were insufficient given the student's auditory processing and attention needs (IHO Decision at p. 7). Further, the IHO found that while the academic goals in the student's IEP were sufficient, the goals did not adequately reflect or address the student's distractibility (*id.*). The IHO next found that the IEP's recommendation for placement in a "full-size" ICT class with one period of SETSS per day and speech-language therapy was insufficient to address the student's needs because "all of the evaluators . . . recommended a small class in a small school," such that "the evidence overwhelmingly support[ed] the student's need for full-time services of a special education teacher in a small class setting" to address her auditory processing, decoding, and attention deficits (*id.* at pp. 7-8).<sup>9</sup>

After finding that the district failed to offer the student a FAPE for the 2012-13 school year, the IHO went on to determine that the parents had established that the unilateral placement at the Aaron School provided appropriate educational benefits for the student by providing all-day instruction in small classes with students of similar age and functional level, and that the student had made progress at the school (IHO Decision at pp. 8-9). The IHO also found that equitable consideration favored the parents' request for reimbursement because they cooperated with the district and voiced their concerns with the offered program (*id.* at p. 9). Lastly, the IHO ordered the district to reimburse the parents for the cost of tuition at the Aaron School for the 2012-13 school year (*id.*).

## **IV. Appeal for State-Level Review**

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year; that the Aaron School was an appropriate placement for the student for the 2012-13 school year; and that equitable considerations favored the parents' request for relief. The district contends that the IHO erred in finding that the district failed to offer a FAPE for several reasons. First, the district asserts that the January 2012 CSE had

---

<sup>9</sup> Despite finding that the district failed to offer the student a FAPE for the 2012-13 school year, the IHO also made several determinations that were adverse to the parents. The IHO found that the January 2012 CSE was properly composed because the district's special education teacher at the CSE had training and experience in general education, which satisfied the district's "legal obligation under the IDEA" (*id.* at pp. 6-7). The IHO also determined that a denial of a FAPE did not result from the district's alleged failure to provide the parents with either of the August 2012 FNRs because they received an FNR after the January 2012 CSE meeting and visited the assigned public school site in June 2012, such that the parents were not prejudiced; the IHO also found that "the parent had committed long before August to continuing the student in the Aaron School" (IHO Decision at p. 8). Moreover, the IHO found that the parents' argument that the student's January 2012 IEP had "expired" in January 2013 was "without practical import to the relevant issues in this case" (*id.*). I also note that the IHO did not address any of the parents' arguments relating to the assigned public school site (*id.* at pp. 6-9).

sufficient evaluative information before it and that all of the evaluations were discussed at the meeting. The district contends that the management needs contained in the January 2012 IEP were designed to address the student's attention and distractibility as well as other needs, and that the student's distractibility and attention needs were not as severe as the IHO indicated. The district asserts that the student's "main areas of struggle" were in reading resulting from her auditory processing disorder, and that the IEP adequately addressed those needs. Next, the district asserts that the goals in the January 2012 IEP were appropriate because they were based on information provided by the Aaron School, on the available evaluations, and on discussions held at the CSE. The district further contends that although there were no goals specifically addressing attention, the lack of such a goal did not deny the student a FAPE because the strategies contained in the IEP addressed the student's management needs relating to her attention deficits. The district asserts that the general education classroom placement with ICT services and SETSS recommended for the student was appropriate because the student needed a special education teacher in the classroom as well as access to typically developing peers because she was socially active. The district notes that an audiologist recommended a small class setting and asserts that the SETSS sessions for math and ELA set forth in the IEP would provide smaller group instruction that the student would benefit from, while not unduly restricting the student by still allowing her to be with typically developing peers in the classroom. The also district contends that the presence of other students in the ICT classroom would not have an impact on the student because the student's distractibility was unrelated to the number of students in her presence. Lastly, the district asserts that the Aaron School was not an appropriate unilateral placement because it provided the student with no opportunities for interaction with her nondisabled peers and that equitable considerations did not favor the parents' request for tuition reimbursement because they did not seriously intend to enroll the student in a public school.

The parents answer, disputing the district's assignments of error. Specifically, the parents first contend that the hearing record does not support the conclusion that the parents received an FNR in August 2012 by a presumption of mailing because testimony from the district's clerical associate did not establish that the FNRs were mailed in accordance with the district's standard office procedures. The parents next contend that the evaluations available to the January 2012 CSE were not adequately discussed and that as a result the student's attention deficits were not adequately described or addressed in her IEP. They assert that the IHO correctly assessed the severity of the student's needs and that the hearing record contained significant evidence of distractibility, hyperactivity, and attention issues that were not related to the student's auditory processing deficits. The parents also contend that the CSE failed to consider and integrate the findings contained in a private neuropsychological evaluation regarding the student's attentional needs, and that there is no evidence in the hearing record that the student's ADHD was discussed at the CSE meeting. In support of the IHO's finding that the lack of goals for attentional needs contributed to a denial of FAPE, the parents contend that IEP contained no goals that would address the student's distraction difficulties and that the management needs in the IEP addressed auditory processing and emotional support but would not address the student's distractibility. Further, the parents assert that there were no goals to address the student's self-esteem. The parents next contend that the IHO correctly found that placement in an ICT classroom with SETSS was not appropriate for the student, because the student required remedial reading help throughout the school day and one period per day of SETSS would not be sufficient. Further, the parents assert that the student's distractions could not be managed in the an ICT setting where a large number of other students might be present in the classroom. The parents contend that all of the evaluations

available to the CSE recommended that the student be placed in a small class within a small school and that the student's emotional needs could not be met in an ICT classroom due to the presence of regular education students. In response to the district's claim that the recommended placement was appropriate in light of LRE concerns, the parents contend that the general education environment would exacerbate the student's low self-esteem related to her academic abilities.

The parents also assert that the IHO correctly determined that the unilateral placement at the Aaron School was appropriate because the school addressed the student's attentional and emotional needs, provided small group academic instruction with appropriate methodology, and was the least restrictive environment (LRE) for the student. Regarding equitable considerations, the parents assert the evidence does not support the district's contention that the parents never seriously considered the public school placement and that they gave appropriate notice of their unilateral placement.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd,

2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

The parents have neither cross-appealed nor raised any arguments in their answer regarding the adverse determinations of the IHO that the January 2012 CSE was properly composed and that the failure to develop an IEP for the student after the student's January 2012 IEP "expired in January 2013" did not constitute a failure to offer the student a FAPE during the 2012-13 school year (IHO Decision at pp. 6-8; see Answer).

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013] [holding that "issues that were decided by the IHO and not appealed or cross-appealed by the party against which they were decided are binding against that party, and on the SRO and this Court, as to that party"]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6 [S.D.N.Y. Mar. 21, 2013] [holding that "parties must appeal (or cross-appeal) any adverse findings of the IHO to preserve those arguments"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief;" see also Parochial Bus. Sys. v. Bd. of Educ., 60 N.Y.2d 539, 545-47 [1983]). While the IDEA provides that "any party aggrieved by the findings and decision" of an IHO may pursue an appeal to the SRO (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]), State regulations

provide that a respondent may seek review of "all or a portion" of an IHO's decision by asserting a cross-appeal in the answer (8 NYCRR 279.4[b]).

As noted above, the IHO in this case found that the January 2012 CSE was properly composed and that the expiration of the January 2012 IEP during the 2012-13 school year did not result in a failure to offer the student a FAPE during that school year (IHO Decision at p. 8). These determinations were adverse to the parents, yet they did not file a cross-appeal challenging the IHO's conclusions (compare Application of the Dep't of Educ., Appeal No. 13-145). Based upon the foregoing, I find that the parents elected not to cross-appeal the adverse findings of the IHO relating to the composition of the CSE and the duration of the January 2012 IEP and thereby have waived their right to pursue these issues, and consequently, I lack the jurisdiction to review them (see Parochial Bus. Sys., Inc., 60 N.Y.2d at 545-47; J.F., 2012 WL 5984915, at \*9; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Additionally, I note that although the parents raised certain claims in their due process complaint notice regarding the particular school site to which the district assigned the student for the 2012-13 school year, the IHO made no findings of fact or determinations relating to those claims (see Parent Ex. A; IHO Decision). Although the parents' answer contains passing references to visiting the assigned school (Answer ¶ 15), they do not raise any arguments about the appropriateness of the assigned school in their answer. Accordingly, I find that the parents have abandoned their claims regarding the assigned school by failing to identify them before me in any fashion or make any legal or factual argument as to how certain unaddressed issues would rise to the level of a denial of a FAPE. Therefore, these claims are not properly before me and I decline to address them herein (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at \*6-\*7, \*10).<sup>10</sup>

## **B. Final Notice of Recommendation**

I will first address whether the district is entitled to benefit from a presumption of mailing to establish that it mailed an FNR and that an FNR was received by the parents. New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed

---

<sup>10</sup> Even had the parents specifically raised arguments regarding the appropriateness of the assigned public school site in their answer; the weight of recent authority would support the conclusion that such claims were speculative and need not be addressed inasmuch as the student never attended the public school site pursuant to the January 2012 IEP (R.E., 694 F.3d at 186-88, 195; see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at \*4 [2d Cir. May 21, 2013]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; but see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

(Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that government officials of the government will perform their duties and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; see Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

In the case at hand, the hearing record contains a photocopy of an FNR dated August 14, 2012 (Dist Ex. 1) as well as a photocopy of an FNR dated August 17, 2012 (Dist. Ex. 2) each identifying the same public school site to which the student was assigned for the 2012-13 school year. A review of the hearing record reflects that the parents' address as indicated on the FNRs is the same as the address for the parents listed on the September 11, 2012 letter from the district to the parents, which the parents admit to having received, and is also the same as the address indicated on the parents' February 5, 2013 amended due process complaint notice (see Tr. pp. 195-96; Dist. Exs. 1; 2; Parent Exs. A at p. 1; I). In addition, I note that the parents do not assert that the August 2012 FNRs were improperly addressed. In considering whether the hearing record contains adequate testimony by one with personal knowledge of the regular course of business, I note that the district's clerical associate testified that part of her responsibilities included processing the FNRs: once a public school site assignment was made by a "placement officer," an FNR was "generated" by a clerk; the FNR was then placed in an envelope addressed according to information in the district's computer systems, and taken to the mailroom for stamping and mailing (Tr. pp. 102-05). The clerical associate indicated that the CSE retained a copy of each FNR it mails (Tr. p. 113). The clerical associate stated that these procedures were in place during August 2012, and indicated that she had no reason to believe that they were not followed in the mailing of either of the August 2012 FNRs (Tr. p. 105). Significantly, the clerical associate did more than testify as to the district's regular course of business in handling FNRs and mailing them to parents; she also testified that she recognized her handwriting on the August 17, 2012 FNR, and that it was generated and mailed by her personally on that date (Tr. pp. 105-06, 108). The clerical associate's testimony also indicates that the date on the FNRs indicates the date that the form was generated and that the FNRs would have been mailed on or around those dates (Tr. pp. 106-07).

Upon review of the evidence hearing record, I find that the copy of the August 17, 2012 FNR, coupled with the clerical associate's testimony, sufficiently establishes that the FNR was prepared, that the FNR reflected the parents' proper address, that the FNR was mailed, and that a copy of the FNR was retained for record keeping purposes (Tr. pp. 99-113; Dist. Ex. 2). I find that

this evidence, at a minimum, gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829).

I am not persuaded by the parents' assertion that the district is not entitled to a presumption of mailing in that the clerical associate's testimony shows that standard office practice was not followed in this instance. The parents correctly point out that the clerical associate testified that the presence of two FNRs indicated that the recommended placement information was provided to two clerical staff members, who then both prepared FNRs, and that this was not standard practice to generate two FNRs (Tr. pp. 105-06). However, rather than indicating that standard practices were not followed, a more reasonable view of the hearing record supports the notion that standard procedures were followed twice, and that both FNRs were generated and mailed in accordance with the procedures. Accordingly, and in concert with the clerical associate's testimony that she personally processed the August 17, 2012 FNR, I find that there was no testimony or evidence rebutting that standard office practice was followed, nor was there evidence in the hearing record showing that the procedure followed was done with such carelessness that it would be reasonable to assume that the FNR was not mailed, therefore the district is entitled to a presumption of mailing and receipt and the parents' assertion that they did not receive either of the August 2012 FNRs does not rebut that presumption (Nassau Ins. Co., 46 N.Y.2d at 829-30; compare Application of the Dep't of Educ., Appeal No. 08-110).

Moreover, aside from my determination, which rests upon the facts above, it also appears from the evidence that the FNR procedure to which the parties have devoted considerable time in this case is a local practice within this particular district—it is not a State law or IDEA requirement. Instead, the IDEA and State regulations provide that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), which standard the parties do not dispute and was clearly met in this case. While I have found that the presumption of mailing and receipt operates in favor of the district, the importance of the FNR procedure to this case is not entirely clear from the hearing record inasmuch as there have been other instances in which this district has not relied solely upon the FNR procedure and IEP services were nevertheless effectuated by the district, or alternative forms of communication regarding the public school site were employed (see e.g., Application of the Bd. of Educ., Appeal No. 12-111). Thus it is unclear what may have occurred regarding the provision of a FAPE under the IEP when the time came to implement the student's IEP.

### **C. January 2012 IEP**

#### **1. Consideration of Evaluative Information and Present Levels of Performance**

In this appeal, the district contends that the IHO erred when she determined that the January 2012 IEP insufficiently reflected the student's attention deficits and that the management needs listed in the IEP were insufficient given the student's auditory processing and attention needs. For the reasons set forth below I agree with the district's contention and find that the January 2012 IEP sufficiently identified and addressed the student's attention and distraction needs.

Among the required elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation

to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Here, a review of the student's IEP reveals that the IEP addressed the student's needs regarding attention by way of the strategies recommended to address the student's management needs (Dist. Ex. 3 at p. 3). Specifically, the IEP provided for positive reinforcement, preferential seating, visual and verbal prompts, teacher check-ins, repetitive text and prompts to reread (id.). While the IHO found that these strategies provided "generic and minimal supports" and were not sufficient for the student due to her needs arising from her ADHD and auditory processing issues (IHO Decision at p. 7), this conclusion is not supported by the hearing record. I note that an August 2011 private auditory processing evaluation and a November 2011 Aaron School report recommended strategies consistent with the management needs strategies on the student's IEP including among other things, preferential seating, visual and verbal prompts, teacher check-ins, repeated opportunities to review information, and prompts to reread for clarification in order to assist the student in staying focused and engaged (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 6 at pp. 1-2, 4, and Dist. Ex. 13 at p. 4). Also consistent with recommendations in the auditory processing evaluation, the IEP provided for testing accommodations related to the student's attending needs, including time extended to time and a half, testing in a separate location in a small quiet room, directions read and reread aloud, and questions read except for reading tests (compare Dist. Ex. 3 at p. 10, with Dist. Ex. 13 at p. 5).

Notwithstanding the provisions in the IEP addressing the student's attention needs, the hearing record read as a whole reflects that the student exhibited a less severe level of need than the IHO found with regard to attention and auditory processing. For example, the July 2011 neuropsychological evaluation reflects that two tests were administered to assess the student's attention skills (Dist. Ex. 11 at pp. 5-6). First, administration of the Conners' Continuous Performance Test-II (CPT-II) revealed a response pattern more closely matching a "clinical" population than a "non-clinical" population and that the student displayed patterns of response associated with inattention and poor vigilance, but not impulsivity (id. at pp. 5-6). However, the evaluator noted that at one point during the 14 minute timed test, the student "overtly lost attention to task when she turned away from the test to ask what the test was supposed to measure," which I note would impact the test results by indicating an overestimate of the student's attention deficit (id. at p. 6). The second measure utilized to evaluate the student's attention skills was the Conners' Parent Rating Scale-Revised, Long Form, wherein the parents' ratings indicated the student had problems completing her homework, focusing for long periods of time, and remaining organized (id.). Although the minutes of the January 2012 CSE meeting reflect that the attention concerns noted in the home were not present in the school, the evaluator determined that the student met the criteria for a diagnosis of an ADHD based on this report by the parents in the home setting (Dist. Exs. 4 at p. 2; 11 at p. 6). In contrast to the ADHD diagnosis, the July 2011 neuropsychological evaluation report indicated that during the evaluation the student was able to "be productive for approximately an hour and a half" and that she had made noticeable improvement since the previous year in her attitude toward tasks that she found challenging in that "[i]nstead of being

overwhelmed, [she] was ready to accept the challenge" (Dist. Ex. 11 at pp. 3-4).<sup>11</sup> The evaluator indicated that when presented with tests that required the student to read either aloud or silently, "she willingly dove in and worked through the tests despite needing breaks from reading," and attempted to use context and phonetics to help her decode unfamiliar words, utilized her sight word vocabulary, and self-corrected mistakes based on the meaning of the paragraph (*id.* at p. 4). In the earlier August 2010 neuropsychological evaluation, the same evaluator indicated that the student "modulated herself well and was able to focus her attention in order to succeed on an item" and "respond[ed] to encouragement so that even in a situation that was uncomfortable for her she could be persuaded to keep on reading with support from the examiner" (Dist. Ex. 10 at p. 6). I find that despite the student's diagnosis of an ADHD, these descriptions of the student do not reflect a level of attention deficit that could not be addressed in an ICT classroom with the management needs strategies reflected in the IEP.

The August 2011 auditory processing evaluation also shed light on the level of the student's attention deficits (Dist. Ex. 13). Although the report reflected significant needs in certain areas,<sup>12</sup> the student's scores on tests which measured her ability to comprehend speech in a poor acoustic environment (SCAN-C filtered words subtest) and in the presence of competing noise (auditory figure ground test), as well as her ability to repeat two words heard simultaneously (competing words test) and to repeat a sentence that she heard in one ear when different sentences were simultaneously presented in both ears (competing sentences), were all within normal limits (*id.* at pp. 2-4). Based on these test results, the student's ability to function in an ICT classroom where competing noise may be present would not be significantly affected by the particular auditory processing deficits that she displayed (*id.*). Additionally, the hearing record reflects that at the time of the January 2012 IEP meeting, the student had attained a level of independence related to her ability to function in the classroom in that the November 2011 Aaron School report indicated that she was able to self-monitor her attention, manage her materials, follow directions and ask questions if unclear, all independently (Dist. Ex. 6 at p. 6). Furthermore, although the auditory processing evaluation reflected that people with auditory processing difficulties do not use the compensatory strategies recommended in the auditory processing evaluation report and discussed above without being trained to do so, the August 2011 speech-language evaluation report reflected that during the evaluation, the student was noted to employ various adaptive learning strategies on her own such as asking for repetition, verbalizing through a task, and allowing herself extra processing time (Dist. Exs. 13 at p. 4; 14 at p. 2).

Based on the above, the hearing record supports a conclusion that the available evaluative information was considered by the January 2012 CSE, that the student's attending and auditory processing difficulties were less severe than the IHO concluded, and the student's attention deficits were adequately and appropriately addressed in the student's January 2012 IEP (J.C.S. v Blind Brook-Rye Union Free School Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that the IDEA does not require the CSE to adopt the particular recommendations of an expert; it

---

<sup>11</sup> However, the evaluator did note that "it was very difficult" for the student to sustain attention after an hour and a half of testing (Dist. Ex. 11 at p. 3).

<sup>12</sup> The evaluation indicated needs relating to phonemic synthesis (phonemic synthesis test) and tolerance-fading memory, decoding, and organization of auditory stimuli (staggered spondaic word test) (Dist. Ex. 13 at pp. 2-4).

only requires that that recommendation be considered in developing the IEP]; G.W. v Rye City Sch. Dist., 2013 WL 1286154, at \*19 [S.D.N.Y. Mar. 29, 2013]).

## **2. Goals**

In its appeal the district also contends that the IHO erred in finding that the goals contained in the student's January 2012 IEP did not adequately reflect or address the student's attention needs. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

To address the student's needs as described above, the CSE developed annual goals in the areas of reading which targeted phonics and word recognition, fluency, vocabulary, and comprehension; math skills related to problem solving and computation; and speech-language skills related to phonemic awareness, critical thinking and verbal reasoning, oral and written language, and comprehension of oral and written information (Dist. Ex. 3 at pp. 5-8). To effectuate these goals, the January 30, 2012 CSE included on the student's IEP the environmental modifications and human/material resources needed to address her management needs including the provision of positive reinforcement, preferential seating, visual and verbal prompts, teacher check ins, repetitive text and prompts to reread (id. at p. 3).

Although the IHO found that there were no goals in the IEP addressing the student's distractibility, the hearing record supports the conclusion that the IEP addressed the student's needs with regard to attention via the strategies utilized to address the student's management needs and as such, it was not necessary to further address the student's attention needs through annual goals (Decision at p. 7; Dist. Ex. 3 at p. 3).

## **3. January 2012 Program Recommendation**

Upon review of the hearing record, and as described below, the general education classroom with ICT services recommended in the student's January 2012 IEP, coupled with the provision of SETSS three periods per week for ELA and two periods per week for mathematics, as well as speech-language therapy, constituted an appropriate educational setting for the student and was reasonably calculated to provide the student with meaningful educational benefits.

At the time of the January 2012 CSE meeting the student exhibited deficits in the areas of reading including decoding (phonological awareness and phonemic manipulation), rate, accuracy, and comprehension; written expression including spelling; math including calculation skills and problem solving tasks that require reading; attending skills; and auditory processing skills related to decoding and organization of auditory stimuli (Dist. Exs. 3 at pp. 1-3; 5; 6 at pp. 1-2, 4, 7-8; 7 at pp. 1-3; 8 at pp. 1-2; 10; 11; 14 at pp. 2-6). With regard to social/emotional development, the

student was reported to exhibit frustration and low self-confidence with regard to her reading skills but also to be an active member of her class, eager to participate in all activities, and as having established meaningful friendships with classmates (Dist. Exs. 3 at p. 3; 6 at pp. 3-4).

State regulations provide that ICT services "means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Pursuant to State regulation, the "maximum number of students with disabilities in [a class providing ICT services to students with disabilities] shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class "shall minimally include a special education teacher and a general [sic] education teacher" as staffing (8 NYCRR 200.6[g][2]). Consistent with the student's needs and in accordance with State regulations, the January 2012 CSE recommended that the student be placed in an ICT classroom to address her needs during academic subjects including math, ELA, social studies, and science (Tr. p. 46; Dist. Ex. 3 at p. 9). The CSE further addressed the student's academic needs with a recommendation for SETSS three periods per week for ELA and twice per week for math (Dist. Ex. 3 at p. 8). Lastly, the CSE recommended that the student receive speech-language therapy for two 30-minute sessions per week in a group of two (*id.* at p. 9).

The IHO found that the recommended ICT class with SETSS once per day would not adequately address the student's needs because, although the CSE properly recognized the severity of the student's academic delays in decoding and calculation and mandated SETSS services for reading and math, all other subjects would not be taught in a small group setting (IHO Decision at p. 7). The IHO also found that due to the student's reading deficits, instruction in writing and spelling, science, and social studies could not be adequately achieved in a classroom with 25 or more students and two teachers (*id.* at pp. 7-8). I disagree.

I note initially that, in contrast to the IHO's finding, and according to the January 2012 IEP, the areas of instruction that were to be targeted by SETSS included math and ELA, which would generally include writing and spelling as well as reading (Tr. pp. 46-47; Dist. Ex. 3 at p. 8). Furthermore, a careful review of the hearing record reflects that the ICT classroom could adequately have addressed the student's needs in a variety of smaller group settings. First, testimony by the special education teacher present at the January 2012 CSE meeting indicated that, as an ICT class is staffed with both a full time regular education teacher and a full time special education teacher, the ICT would have provided the student with a small class setting and smaller student-to-teacher ratio than a general education class without ICT services (Tr. pp. 49-51). Testimony by the special education teacher further indicated that the student would typically receive SETSS in a group and that as per her IEP, SETSS would take place within the classroom setting (Tr. p. 47).<sup>13</sup> As such, during the five periods of SETSS that the student received per week,

---

<sup>13</sup> There is no specific guarantee that the group of SETSS students in this instance would be capped at a group of eight students as suggested by unreliable retrospective testimony since it was not set capped at eight on the IEP (*see* Tr. p. 47). However, assuming that every special education student in the ICT had simultaneous push in SETSS on his or her IEP, the group would be effectively capped by State regulation at the maximum of the 12 permissible students in the ICT in the absence of a variance (8 NYCRR 200.6[g][1]). If the district had shown how SETSS services were subject to the regulatory limits imposed upon group instruction in a resource room model, such a group would be limited to a cap of eight as the teacher suggested in her testimony (*see* 8 NYCRR 200.6[f][3]), but SETSS is not defined in federal or state regulations and the district has pointed to no other legal authority that imposes such specific limits upon SETSS.

there would be three teachers supporting the students within the ICT classroom (Tr. pp. 47-48, 69).<sup>14</sup> Furthermore, although the private evaluations recommended that the student be placed in a small class, they, like the district, did not specify a particular maximum student-to-teacher ratio (Dist. Exs. 11 at p. 7; 13 at p. 5; 14 at p. 6; Parent Ex. E at p. 1).

Additionally, the hearing record reflects that the CSE considered other placements for the student and determined that the ICT class with SETSS constituted the LRE in which the student could receive educational benefits (Tr. pp. 49-50; Dist. Exs. 4 at p. 2). The hearing record reflects that the January 2012 IEP was the student's initial IEP and that the student had struggled in her general education classroom without the benefit of special education services (Tr. p. 179; Dist. Exs. 3 at p. 2; 7 at pp. 1, 3). However, with the implementation of this IEP the student would be placed in a blended setting where, along with approximately 11 other special education students, she would receive special education services specifically designed to address her academic needs. While it is reasonable to understand that the student may have had self-esteem and self-confidence issues related to her academic performance when she struggled in her previous general education class without additional support services, the hearing record provides no reason to remove her entirely from her general education peers. Furthermore, placement in an ICT classroom with other special education students would allow her academic performance to reflect the benefit of the special education services recommended by the January 2012 IEP. In light of the above, I do not disagree with the district's contention that an ICT class with SETSS was the LRE for the student (M.W. v New York City Dept. of Educ., 725 F.3d 131, 143 [2d Cir 2013] [noting that the "IDEA 'expresses a strong preference' for educating disabled students alongside their non-disabled peers; that is, in their (LRE)"], quoting Walczak, 142 F.3d at 122).

Based on the above, the hearing record does not support the IHO's finding that the student required a small class setting in a small school to address the overlapping nature of her auditory processing, decoding, and attention deficits but rather, demonstrates that the student's needs would have been appropriately addressed in the program recommended by the CSE. Although the IHO found that the CSE should have accepted the recommendations of the private providers, while a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., J.C.S., 2013 WL 3975942, at \*11; G.W., 2013 WL 1286154, at \*19; Dirocco v Bd. of Educ., 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. Jun. 19, 2009]). Moreover, the IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). I further note that despite the parents' preference for the Aaron School, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011]; Application of the Dep't of Educ., Appeal No. 11-141; Application of a Student with a

---

<sup>14</sup> The special education teacher also testified that, based on his experience teaching in ICT classrooms, reading and math instruction typically would be conducted in small groups of six students to one teacher, a fact taken into consideration when developing the recommendation for the student (Tr. p. 51).

Disability, Appeal No. 08-043; see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at \*8 [S.D.N.Y. Mar. 12, 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054; see also, B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at \*8 [S.D. Cal., Feb. 14, 2013] [noting that even if the services requested by the parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, so long as the IEP is reasonably calculated to provide the student with educational benefits]).

## **VII. Conclusion**

Based on the evidence contained in the hearing record, the recommended placement in a general education classroom with ICT services coupled with SETSS and speech-language therapy was reasonably calculated to provide the student with educational benefits in the LRE and, therefore, offered her a FAPE during the 2012-13 school year. Having determined that the district offered the student a FAPE for the 2012-13 school year, it is not necessary to reach the issue of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated July 18, 2013 is modified by reversing those portions that concluded that the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to reimburse the parents for the cost of the student's tuition at the Aaron School.

**Dated:**           **Albany, New York**  
                          **October 18, 2013**

\_\_\_\_\_  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**